For Publication

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

	) MDL-1105 (REK)
	) D. Mass. C.A. 96-11534-REK
	)
	)
	) Kendall et al. v. Metropolitan Life
	) Insurance Co. et al., Civil Action No.
	) 03-11040-REK;
	)
IN RE NEW ENGLAND MUTUAL LIFE	) Henderson et al. v. Metropolitan Life
INSURANCE COMPANY	) Insurance Co. et al., Civil Action No.
SALES PRACTICES LITIGATION	) 03-11041-REK;
	)
	) Caston et al. v. Metropolitan Life
	) Ins. Co. et al., Civil Action No.
	) 03-11547-REK;
	)
	) Pike County National Bank v.
	) Metropolitan Life Insurance
	) Co. et al., Civil Action No.
	) 03-11548-REK.

MEMORANDUM IN EXPLANATION
and
PRACTICE AND PROCEDURE
ORDER NO. 19

July 6, 2004

Practice and Procedure Order No. 19 supplements earlier Practice and Procedure Orders and does not modify any of them.

Memorandum in Explanation

I. Introduction

In Practice and Procedure Order Number 18 (September 24, 2003), this court concluded that the only tag-along civil actions remaining in this MDL proceeding, MDL-1105 (REK), were:

> Kendall et al. v. Metropolitan Life Insurance Co. et al., N.D. Mississippi, C.A. No. 2:02-287, Civil Action No. 03-11040-REK;
>
> Henderson et al. v. Metropolitan Life Insurance Co. et al., S.D. Mississippi, C.A. No. 3:03-9, Civil Action No. 03-11041-REK;
>
> Caston et al. v. Metropolitan Life Ins. Co. et al., N.D. Mississippi, C.A. No. 4:02-275, Civil Action No. 03-11547-REK; and
>
> Pike County National Bank v. Metropolitan Life Insurance Co. et al., S.D. Mississippi, C.A. No. 3:03-51, Civil Action No. 03-11548-REK.

This court also noted a schedule for further filings in Kendall and Henderson.

On October 6, 2003, a panel of the United States Court of Appeals for the First Circuit decided In re New England Life Insurance Co. Sales Practices Litigation, 346 F.3d 218 (1st Cir. 2003), affirming my decision in In re New England Life Insurance Co. Sales Practices Litigation, 236 F. Supp. 2d 69 (D. Mass. 2003) (SG Metals Indus., Inc. v. New England Life Ins. Co., No. 02-11626-REK).

On November 24, 2003, this court issued a Memorandum and Order in Kendall (Docket No. 36 in Civil Action No. 03-11040), allowing plaintiffs' motion for enlargement of

time to serve defendant Rose Dyson.

On December 12, 2003, this court heard oral argument on all motions pending in Caston and Pike County. Before the hearing on December 12, 2003, this court allowed the requests for leave presented in the following motions:

> (1) New England's Motion for Leave To Exceed Page Limit (Docket No. 39, filed December 2, 2003);
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> (2) Plaintiffs' Motion To File Their Rebuttal Memorandum in Support of Motion To Remand Out of Time (Docket No. 39, filed December 8, 2003);
>
> (3) Plaintiffs' Motion for Leave To Exceed Page Limit (Docket No. 40, filed December 8, 2003).

On January 20, 2004, this court issued an Order in Kendall (Docket No. 39 in Civil Action No. 03-11040), allowing plaintiffs' second motion for enlargement of time to serve defendant Rose Dyson.

On February 6, 2004, a panel of the First Circuit decided Grispino v. New England Mutual Life Ins. Co., 358 F.3d 16 (1st Cir. 2004), affirming my decision in Grispino v. New England Mutual Life Ins. Co., No. 02-12083-REK (D. Mass. May 20, 2003).

This Memorandum considers and disposes of all pending motions in the four remaining tag-along cases (Kendall, Henderson, Caston, and Pike County). I turn first to a generally applicable issue: the authority of this court to remand MDL-transferred cases directly to state court.

II. Authority of This Court To Remand to State Court

Plaintiffs in all four remaining tag-along cases have moved to remand their

respective cases to state court. In three of the four cases, defendants contend that this court, sitting as an MDL transferee court, lacks authority as a matter of law to remand tag-along cases directly to state courts.

It is clear and unambiguous under federal case law, however, that an MDL transferee court may remand a tag-along case to state court. The Judicial Panel on Multidistrict Litigation ("MDL Panel") has concluded repeatedly that "pending motions to remand [MDL-transferred actions] to their respective state courts can be presented to and decided by the transferee judge." In re Ford Motor Co. Crown Victoria Police Interceptor Prods. Liab. Litig., 229 F. Supp. 2d 1377, 1378 (J.P.M.L. 2002); see also In re Western States Wholesale Natural Gas Antitrust Litig., 290 F. Supp. 2d 1376, 1378 (J.P.M.L. 2003); In re Farmers Ins. Exchange Claims Representatives' Overtime Pay Litig., 196 F. Supp. 2d 1373, 1375 (J.P.M.L. 2002); In re Prudential Ins. Co. of Am. Sales Practices Litig., 170 F. Supp. 2d 1346, 1347 (J.P.M.L. 2001); In re Air Crash Disaster at Florida Everglades on December 29, 1972, 368 F. Supp. 812, 813 (J.P.M.L. 1973).

Furthermore, the arguments that defendants offer in support of their assertion of law are erroneous or irrelevant. For example, defendants contend that, by virtue of having transferred an action to this court, the MDL Panel concluded that this court has subject matter jurisdiction over the action. (See, e.g., Def. New England's Memo. Supporting Resp. to Pl.'s Second Supp., Docket No. 31 in Civil Action No. 03-11041, at 3.) This contention, however, is inconsistent with federal law. The statutory provision that governs multidistrict litigation (28 U.S.C. § 1407) "does not empower the MDL Panel to decide questions going to the jurisdiction or the merits of a case." In re Ivy, 901 F.2d 7, 9 (2d Cir. 1990) (emphasis added).

Defendants, citing to 28 U.S.C. § 1407 and Rule 7.6(b) of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation, also contend that the MDL Panel, not this court, is empowered to remand cases to transferor courts. (See, e.g., Def. New England's Memo. Supporting Resp. to Pl.'s Second Supp., Docket No. 31 in Civil Action No. 03-11041, at 3.) This contention is correct as far as it goes. But this contention by defendants is irrelevant because the issue here is not remand to the federal transferor court, but rather remand to the original state court.

For the foregoing reasons, I conclude that this court has authority to remand tag-along cases directly to state courts. Accordingly, in the remainder of this Memorandum, I do consider and decide the pending motions to remand in the four remaining tag-along cases.

I turn first to Kendall, Henderson, and Caston, the three of which I consider together because the motions to remand in the three cases present nearly identical issues of diversity jurisdiction and fraudulent joinder. I then address Pike County, which presents issues unique to itself.

III. Kendall (Civil Action No. 03-11040-REK), Henderson (Civil Action No. 03-11041-REK), and Caston (Civil Action No. 04-11547-REK)

A. Pending Matters

1. Kendall

Pending for decision in Kendall (03-11040-REK) are matters related to the following filings:

(1) Plaintiffs' Motion To Remand (Docket No. 5, filed July 22, 2003), with Memorandum of Authorities in Support of Plaintiffs' Motion To Remand (Docket No. 8, filed August 7, 2003);

(2) New England's Opposition to Plaintiffs' Motion To Remand (Docket No. 9, filed August 8, 2003);

(3) Defendant Fulton A. Jordan, Jr., d/b/a/ Jordan & Associates' Joinder in Opposition to Plaintiffs' Motion To Remand (Docket No. 10, filed August 11, 2003);

(4) Defendants William Ratcliffe and William McNamara's Joinder in Opposition to Plaintiffs' Motion To Remand (Docket No. 11, filed August 18, 2003);

(5) Plaintiffs' Supplemental Authority in Support of Motion To Remand (Docket No. 41, filed August 26, 2003);

(6) New England's Supplemental and Amended Opposition to Plaintiffs' Motion To Remand (Docket No. 18, filed September 18, 2003);

(7) Plaintiffs' Second Supplement of Authorities in Support of Plaintiffs' Motion To Remand (Docket No. 19, filed September 19, 2003);

(8) Plaintiffs' Motion To Substitute the Affidavit of Allen K. Hess (Docket No. 24, filed September 29, 2003);

(9) Defendant Fulton A. Jordan's Response to the Plaintiff's [sic] Second Supplement of Authorities in Support of Plaintiff's [sic] Motion To Remand (Docket No. 34, filed October 16, 2003);

(10) Plaintiffs' Response to Fulton A. Jordan's Response to Plaintiffs' Second Supplement of Authorities in Support of Plaintiffs' Motion To Remand (Docket No. 30, filed

October 16, 2003);

(11) New England's Response to the Plaintiffs' Second Supplement of Authorities in Support of Plaintiffs' Motion To Remand (Docket No. 27, filed October 2, 2003);

(12) Plaintiffs' Response to New England's Response to Plaintiffs' Second Supplement of Authorities in Support of Plaintiffs' Motion To Remand (Docket No. 31, filed October 16, 2003);

(13) Letter from Matt Stephens [Regarding Plaintiffs' Motion To Remand] (Docket No. 42, filed June 7, 2004);

(14) Defendants William Ratcliffe and William McNamara's Motion To Dismiss, or, in the Alternative, for Summary Judgment (Docket No. 12, filed August 21, 2003), with Defendants' Memorandum in Support of Motion To Dismiss or, in the Alternative, Motion for Summary Judgment (Docket No. 13, filed August 21, 2003);

(15) Plaintiffs' Response to Defendants Ratcliffe's and McNamara's Motion To Dismiss or, in the Alternative, Motion for Summary Judgment (Docket No. 15, filed September 2, 2003);

(16) Defendants Ratcliffe and McNamara's Supplement to Motion To Dismiss, or, in the Alternative, for Summary Judgment (Docket No. 23, filed September 22, 2003);

(17) Plaintiffs' Response to Defendants Ratcliffe's and McNamara's Supplement to Motion To Dismiss or, in the Alternative, Motion for Summary Judgment (Docket No. 25, filed October 1, 2003);

(18) Defendant Agents' [Ratcliffe and McNamara's] Rebuttal Brief in Support of Their Motion To Dismiss (Docket No. 32, filed October 20, 2003);

(19) Defendant Fulton A. Jordan's Motion for Summary Judgment (Docket No. 17, filed September 18, 2003), with Memorandum in Support of Fulton A. Jordan's Motion for Summary Judgment (Docket No. 21, filed September 18, 2003);

(20) Plaintiffs' Response to Defendant Fulton A. Jordan's Motion for Summary Judgment (Docket No. 26, filed October 1, 2003).

2. Henderson

Pending for decision in Henderson (03-11041-REK) are matters related to the following filings:

(1) Plaintiffs' Motion To Remand (Docket No. 4, filed July 22, 2003), with Memorandum of Authorities in Support of Plaintiffs' Motion To Remand (Docket No. 7, filed August 7, 2003);

(2) New England's Opposition to Plaintiffs' Motion To Remand (Docket No. 8, filed August 8, 2003), with Memorandum of Authorities Supporting New England's Opposition to Plaintiffs' Motion To Remand (Docket No. 9, filed August 8, 2003);

(3) Defendant Fulton A. Jordan, Jr., d/b/a/ Jordan & Associates' Joinder in Opposition to Plaintiffs' Motion To Remand (Docket No. 10, filed August 11, 2003);

(4) Defendants Kyle Spring and Cooper DeLoach's Joinder in Opposition to Plaintiffs' Motion To Remand (Docket No. 11, filed August 18, 2003);

(5) Plaintiffs' Supplemental Authority in Support of Motion To Remand (Docket No. 34, filed August 26, 2003);

(6) New England's Supplemental Opposition to Plaintiffs' Motion To Remand

(Docket No. 18, filed September 18, 2003);

(7) Plaintiffs' Second Supplement of Authorities in Support of Plaintiffs' Motion To Remand (Docket No. 19, filed September 19, 2003);

(8) Plaintiffs' Motion To Substitute the Affidavit of Allen K. Hess (Docket No. 22, filed September 29, 2003);

(9) Defendant Fulton A. Jordan's Response to the Plaintiff's [sic] Second Supplement of Authorities in Support of Plaintiff's [sic] Motion To Remand (Docket No. 26, filed October 2, 2003);

(10) Plaintiffs' Response to Fulton A. Jordan's Response to Plaintiffs' Second Supplement of Authorities in Support of Plaintiffs' Motion To Remand (Docket No. 29, filed October 16, 2003);

(11) New England's Response to Plaintiffs' Second Supplement of Authorities in Support of Plaintiffs' Motion To Remand (Docket No. 27, filed October 6, 2003), with New England's Memorandum of Authorities Supporting Its Response to Plaintiffs' Second Supplement of Authorities in Support of Plaintiffs' Motion To Remand (Docket No. 31, filed October 21, 2003);

(12) Plaintiffs' Response to New England's Response to Plaintiffs' Second Supplement of Authorities in Support of Plaintiffs' Motion To Remand (Docket No. 28, filed October 16, 2003);

(13) Letter from Matt Stephens [Regarding Plaintiffs' Motion To Remand] (Docket No. 35, filed June 7, 2004);

(14) Defendants Cooper DeLoach and Kyle Spring's Motion To Dismiss, or, in the

Alternative, for Summary Judgment (Docket No. 12, filed August 21, 2003), with Defendants' Memorandum in Support of Motion To Dismiss or, in the Alternative, Motion for Summary Judgment (Docket No. 13, filed August 21, 2003);

(15) Plaintiffs' Response to Defendants DeLoach's and Spring's Motion To Dismiss or, in the Alternative, Motion for Summary Judgment (Docket No. 15, filed September 2, 2003);

(16) Defendants Deloach and Spring's Supplement to Motion To Dismiss, or, in the Alternative, for Summary Judgment (Docket No. 21, filed September 22, 2003);

(17) Plaintiffs' Response to Defendants DeLoach's and Spring's Supplement to Motion To Dismiss; [sic] or, in the Alternative, Motion for Summary Judgment (Docket No. 23, filed October 1, 2003);

(18) Defendant Agents' [DeLoach and Spring's] Rebuttal Brief in Support of Their Motion To Dismiss (Docket No. 30, filed October 21, 2003);

(19) Defendant Fulton A. Jordan's Motion for Summary Judgment (Docket No. 16, filed September 18, 2003), with Memorandum in Support of Fulton A. Jordan's Motion for Summary Judgment (Docket No. 17, filed September 18, 2003);

(20) Plaintiffs' Response to Defendant Fulton A. Jordan's Motion for Summary Judgment (Docket No. 24, filed October 1, 2003).

3. Caston

Pending for decision in Caston (03-11547-REK) are matters related to the following filings:

(1) Plaintiffs' Motion To Remand (Docket No. 35, filed November 21, 2003), with Plaintiffs' Memorandum in Support of Motion To Remand (Docket No. 36, filed November 21, 2003), with Plaintiffs' Notice of Filing of Evidentiary Material in Support of Motion To Remand (Docket No. 41, filed December 8, 2003);

(2) Defendant New England's Opposition to Motion To Remand (Docket No. 38, filed December 2, 2003);

(3) Plaintiffs' Rebuttal Memorandum in Support of Motion To Remand (Docket No. 42, filed December 8, 2003);

(4) Defendant New England's Brief on the Applicability of the Younger Doctrine (Docket No. 43, filed January 15, 2004);

(5) Plaintiffs' Brief on the Applicability of the Younger Doctrine (Docket No. 44, filed January 16, 2004);

(6) Defendant Agents' Brief in Opposition to Abstention (Docket No. 45, filed January 20, 2004).

B. Relevant Procedural Background

1. Kendall

On October 30, 2002, the Kendall plaintiffs filed their civil action in the Circuit Court of Tallahatchie County, Mississippi.

On December 4, 2002, defendant Metropolitan Life Insurance Company (successor in interest of New England Mutual Life Insurance company, hereinafter referred to as "New England") filed a notice of removal with the United Stated District Court for the Northern

District of Mississippi.

In the Northern District of Mississippi, the Kendall plaintiffs filed a motion to remand. The parties conducted discovery related to the issue of remand.

In April 2003, the Judicial Panel on Multidistrict Litigation made a conditional transfer order, transferring this case to this court. On June 4, 2003, the record in this case was received in this court from the Northern District of Mississippi.

At a hearing on July 8, 2003, this court directed counsel to re-file in this court the motion to remand and response that were pending in the Northern District of Mississippi.

On July 22, 2003, the Kendall plaintiffs filed in this court a motion to remand (Docket No. 5). Defendant New England filed an opposition (Docket No. 9), which was later joined by all the other Kendall defendants (Docket Nos. 10 and 11). On August 26, 2003, the Kendall plaintiffs filed supplemental authority (Docket No. 41).

On August 21, 2003, defendants William Ratcliffe and William McNamara filed a motion to dismiss (Docket No. 12). The Kendall plaintiffs have opposed the motion (Docket No. 15).

At a hearing on September 2, 2003, this court heard oral argument on all motions pending at the time. This court then set a schedule for further filings.

In accordance with the schedule, the parties made numerous supplemental filings and responses with regard to the Kendall plaintiffs' motion to remand (Docket Nos. 18, 19, 24, 27, 30, 31, and 34). The parties also supplemented defendants Ratcliffe and McNamara's motion to dismiss (Docket Nos. 23, 25, 32).

On September 18, 2003, defendant Fulton A. Jordan filed a motion for summary

judgment (Docket No. 17). The Kendall plaintiffs opposed this motion (Docket No. 26).

2. Henderson

On December 2, 2002, the Henderson plaintiffs filed their civil action in the Circuit Court of Hinds County, Mississippi.

On January 3, 2003, defendant New England filed a notice of removal with the United States District Court for the Southern District of Mississippi.

In the Southern District of Mississippi, the Henderson plaintiffs filed a motion to remand. United States District Judge Barbour allowed limited discovery related to the issue of remand.

In late April 2003, the Judicial Panel on Multidistrict Litigation made a conditional transfer order, transferring this case to this court. On June 16, 2003, the record in this case was received in this court from the Southern District of Mississippi.

At a hearing held July 8, 2003, this court directed counsel to re-file in this court the motion to remand and response that were pending in the Southern District of Mississippi. This court also allowed depositions of defendants DeLoach and Spring, although with limitations in light of the fact that the time for remand-related discovery had expired.

On July 22, 2003, the Henderson plaintiffs filed in this court a motion to remand (Docket No. 4). Defendant New England filed an opposition (Docket No. 8), which was later joined by all the other Henderson defendants (Docket Nos. 10 and 11). On August 26, 2003, the Henderson plaintiffs filed supplemental authority (Docket No. 34).

On August 21, 2003, defendants DeLoach and Spring filed a motion to dismiss

(Docket No. 12). The Henderson plaintiffs have opposed the motion (Docket No. 15).

At a hearing held on September 2, 2003, this court heard oral argument on all motions pending at the time. This court then set a schedule for further filings.

In accordance with the schedule, the parties made numerous supplemental filings and responses with regard to the Henderson plaintiffs' motion to remand (Docket Nos. 18, 19, 22, 26-29, and 31). The parties also supplemented defendants DeLoach and Spring's motion to dismiss (Docket Nos. 21, 23, and 30).

On September 18, 2003, defendant Fulton A. Jordan filed a motion for summary judgment (Docket No. 16). The Henderson plaintiffs opposed this motion (Docket No. 24).

3. Caston

On October 17, 2002, the Caston plaintiffs filed their civil action in the Circuit Court of LeFlore County, Mississippi.

On November 18, 2002, defendant New England filed a notice of removal with the United States District Court for the Northern District of Mississippi.

In the Northern District of Mississippi, the Caston plaintiffs filed a motion to remand. United States District Judge W. Allen Pepper, Jr. allowed limited discovery related to the issue of remand.

In August 2003, the Judicial Panel on Multidistrict Litigation made a conditional transfer order, transferring this case to this court. On September 3, 2003, the record in this case was received in this court from the Northern District of Mississippi.

On November 21, 2003, the Caston plaintiffs filed with this court a motion to

remand this civil action to the Circuit Court of LeFlore County, Mississippi (Docket No. 35). Defendant New England has filed an opposition (Docket No. 38). The Caston plaintiffs filed a rebuttal memorandum (Docket No. 42).

At a hearing on December 12, 2003, this court heard oral argument on all motions pending at the time. This court invited the parties to submit briefs on the appropriateness of abstention in this case.

In January 2004, all parties filed briefs regarding the issue of abstention (Docket Nos. 43-45).

C. Plaintiffs' Motions To Remand

1. Preliminary Matters

a. Motions To Substitute in Kendall and Henderson

Plaintiffs in Kendall and Henderson have filed motions to substitute the affidavit of Allen K. Hess. Facsimiles of the affidavit had been included with the documents marked in both cases as Docket Number 19, which in both cases is one of the many supplements to the plaintiffs' motion to remand. Plaintiffs in Kendall and Henderson now move to substitute originals for the facsimiles. Both motions to substitute are unopposed. The Practice and Procedure Order below accordingly allows the Kendall plaintiffs' motion to substitute (Docket No. 24 in Civil Action No. 03-11040) and the Henderson plaintiffs' motion to substitute (Docket No. 22 in Civil Action No. 03-11041).

b. Appropriateness of Abstention in Caston

At the hearing on December 12, 2003, this court invited the Caston parties to submit briefs regarding the appropriateness of Younger abstention in the case at bar. The Caston parties have done so (Docket Nos. 43-45) and appear to agree that abstention is inappropriate in the circumstances of Caston. After due consideration, I concur and conclude that abstention is inappropriate in Caston.

2. Introduction

In all three cases, defendant New England removed the original state action to federal court under 28 U.S.C. § 1441, alleging federal diversity jurisdiction.

On the faces of the three complaints, complete diversity does not exist. See American Fiber & Finishing, Inc. v. Tyco Healthcare Group, LP, 362 F.3d 136, 139 (1st Cir. 2004) ("[T]here must be complete diversity among the parties to sustain diversity jurisdiction." (citing Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267, 267 (1806))). Plaintiffs are all residents of the state of Mississippi, and all the defendants other than New England are also residents of Mississippi.

New England contends, however, that plaintiffs in all three cases fraudulently joined their respective non-diverse defendants. See Mills v. Allegiance Healthcare Corp., 178 F. Supp. 2d 1, 4 (D. Mass. 2001) (Saris, J.) ("Th[e] right of removal [on the basis of diversity jurisdiction cannot be defeated by a fraudulent joinder of a non-diverse defendant . . . ."); see also Triggs v. John Crump Toyota, Inc., 154 F.3d 1284, 1287 (11th Cir. 1998) ("Fraudulent joinder is a judicially created doctrine that provides an exception to the requirement of complete diversity.").

Plaintiffs in all three cases have moved under 28 U.S.C. § 1447 to remand their respective civil action to the state court from which it was removed. The Kendall, Henderson, and Caston plaintiffs assert that defendant New England has failed to demonstrate that their respective non-diverse defendants are fraudulently joined and that, accordingly, this court lacks federal subject matter jurisdiction to hear their respective case.

3. Legal Standard for Fraudulent Joinder

a. Choice of Law

In the ordinary course, questions of federal law in MDL-transferred cases are governed by the law of the transferee circuit. See Montana v. Abbot Labs., 266 F. Supp. 2d 250, 259-60 (D. Mass. 2003); see also, e.g., In re Temporomandibular Joint Implants Prods. Liability Litig., 97 F.3d 1050, 1055 (8th Cir. 1996) ("When analyzing questions of federal law, the transferee court should apply the law of the circuit in which it is located."); In re Korean Air Lines Disaster of September 1, 1983, 829 F.2d 1171, 1174 (D.C. Cir. 1987) ("[W]e are persuaded by thoughtful commentary that 'the transferee court [should] be free to decide a federal claim in the manner it views as correct without deferring to the interpretation of the transferor circuit.'" (quoting Richard L. Marcus, Conflict Among Circuits and Transfers Within the Federal Judicial System, 93 Yale L.J. 677, 721 (1984))). The law of the transferor circuit – here, the Fifth Circuit – "merits close consideration, but [it] does not have stare decisis effect in a transferee forum situated in another circuit." Korean Air Lines Disaster, 829 F.2d at 1176.

With respect to certain unique questions of federal law, some debate does exist regarding the application of transferor/transferee circuit law. See, e.g., In re United Mine Workers

of Am. Employee Benefit Plans Litig., 854 F. Supp. 914 (D.D.C. 1994). Such questions are not at issue here, however.

Accordingly, I look to the case law of this circuit for the legal standard for fraudulent joinder.

b. Law of the First Circuit

The doctrine of fraudulent joinder has not oft been examined in the case law of this circuit. Indeed, the Court of Appeals for the First Circuit has not articulated a standard for evaluating a claim of fraudulent joinder. I look, therefore, to the decisions of my able colleagues on this court. See Mills, 178 F. Supp. 2d at 4-6 (Saris, J.); Fabiano Shoe Co., Inc. v. Black Diamond Equipment, Ltd., 41 F. Supp. 2d 70, 71-72 (D. Mass. 1999) (Harrington, J.).

Judge Saris has described "[t]he linchpin of the fraudulent joinder analysis [as] whether the joinder of the non-diverse party has a reasonable basis in law and fact." Mills, 178 F. Supp. 2d at 4. She cited with some approval the following disjunctive test from the Second Circuit:

> "In order to show that naming a non-diverse defendant is a 'fraudulent joinder' effected to defeat diversity, the defendant must demonstrate, by clear and convincing evidence, either that there has been outright fraud committed in the plaintiff's pleadings, or that there is no possibility, based on the pleadings, that the plaintiff can state a cause of action against the non-diverse defendant in state court."

Id. at 5 (quoting Whitaker v. Am. Telecasting, Inc., 261 F.3d 196, 207 (2d Cir. 2001)). To the latter portion of the test, Judge Saris added that a "mere theoretical possibility of recovery" is not sufficient. Id. (citing Badon v. RJR Nabisco Inc., 236 F.3d 282, 286 n.4 (5th Cir. 2000)).

Judge Harrington similarly states:

> Joinder is considered fraudulent when there is no possibility that the plaintiff can prove a cause of action against the non-diverse defendant. The burden of establishing that joinder is fraudulent is on the party seeking removal to federal court, and the burden is a heavy one.

Fabiano Shoe, 41 F. Supp. 2d at 71 (citations omitted).

I agree with both Judge Saris and Judge Harrington. In deciding the matters now before me, I will follow the well-reasoned opinions in Mills and Fabiano Shoe. I will also follow the opinion of the Court of Appeals for the Second Circuit in Whitaker.

c. Common Defense Rule

i. Introduction

Plaintiffs in all three cases point out that the law of fraudulent joinder developed in the Fifth Circuit differs slightly from that developed in Mills, Fabiano Shoe, and Whitaker. In particular, plaintiffs bring to my attention a rule recently adopted by a panel of the Fifth Circuit that no court in this circuit has yet considered. Specifically, that panel concluded that the United States Supreme Court, in Chesapeake & Ohio Railway Co. v. Cockrell, 232 U.S. 146 (1914), articulated the "common defense rule," which narrows the doctrine of fraudulent joinder. See Smallwood v. Illinois Central Railroad Co., 342 F.3d 400 (5th Cir.) [hereinafter Smallwood I], reh'g denied, 352 F.3d 220 (5th Cir.) [hereinafter Smallwood II], and reh'g en banc granted, 355 F.3d 357 (5th Cir. 2003) [hereinafter Smallwood III].

The Kendall, Henderson, and Caston plaintiffs contend that this "common defense rule" applies to the facts and circumstances of their respective case, and urge me also to adopt

this "common defense rule."

As explained above, I have no obligation to follow Fifth Circuit precedent. But, I may not ignore applicable Supreme Court precedent. Accordingly, I turn now to Cockrell to determine, as a matter of first impression in this circuit, the contours and applicability of the so-called "common defense rule" of Cockrell.

ii. Cockrell

In Cockrell, the Supreme Court reviewed a decision that denied the efforts by petitioner Chesapeake & Ohio Railway Company (C&O) to remove the original action to federal court. The original case, in state court, was brought by Cockrell against C&O and two employees of C&O (an engineer and a fireman). Complete diversity did not exist. C&O was a Virginia corporation. Plaintiff Cockrell and the two defendant employees were citizens of Kentucky. C&O nevertheless attempted to remove the case to federal court on the basis of diversity jurisdiction, alleging that the defendant employees had been fraudulently joined.

In support of its contention of fraudulent joinder, C&O asserted that plaintiff Cockrell's negligence charges against the non-diverse defendant employees "were each and all 'false and untrue' . . . and that none of the charges of negligence [against the non-diverse defendants] could be sustained on the trial." Cockrell, 232 U.S. at 151. The Court rejected the argument of fraudulent joinder, explaining the following way:

> Putting out of view, as must be done, the epithets and mere legal conclusions in the petition for removal, [defendant C&O's petition] may have disclosed an absence of good faith on the part of the plaintiff in bringing the action at all, but it did not show a fraudulent joinder of the engineer and fireman. With the allegation that they

> were operating the train which did the injury standing unchallenged, the showing amounted to nothing more than a traverse of the charges of negligence . . . . As no negligent act or omission personal to the railway company was charged, and its liability, like that of the two employees, was, in effect, predicated upon the alleged negligence of the latter, the showing manifestly went to the merits of the action as an entirety, and not to the joinder; that is to say, it indicated that the plaintiff's case was ill founded as to all the defendants. Plainly, this was not such a showing as to engender or compel the conclusion that the two employees were wrongfully brought into a controversy which did not concern them. As they admittedly were in charge of the movement of the train, and their negligence was apparently the principal matter in dispute, the plaintiff had the same right, under the laws of Kentucky, to insist upon their presence as real defendants as upon that of the railway company.

Id. at 153 (emphases added).

The Supreme Court, in the middle of the above passage, distinguishes between an allegation that non-diverse defendants are fraudulently joined and an allegation that no case exists against any of the defendants (non-diverse and diverse alike). The Court makes clear that an allegation that applies to all the defendants – that goes to "the merits of the action as an entirety" – is not about fraudulent joinder. Such an assertion, the Court indicates, does not show that the non-diverse defendants were "wrongfully brought into a controversy which did not concern them."

Stated differently, if an argument offered to prove fraudulent joinder of non-diverse defendants also shows that no case exists against the diverse defendants, it is not apparent why the non-diverse defendants should be set apart as "fraudulently joined." Such an argument is in fact no more than an assertion that no case can be made against any of the defendants (diverse and non-diverse alike). In those circumstances, as the Court states,"the plaintiff ha[s] the same

right . . . to insist upon [the] presence [of the local defendants] as real defendants as upon that of the [diverse defendants]." Id.

Accordingly, I conclude that, under Cockrell, fraudulent joinder does not exist when an argument offered to prove the fraudulent joinder of non-diverse defendants simultaneously shows that no case exists against the diverse defendant or defendants. In those circumstances, no legitimate reason exists to label the non-diverse defendants as fraudulently joined. Cockrell clarifies and, in effect, narrows the doctrine of fraudulent joinder.

Defendant New England suggests an alternate interpretation of Cockrell (Def. New England's Supp. & Am. Opp., Docket No. 18 in Civil Action No. 03-11040, at 7-8), but I am not persuaded. New England focuses on the following sentence from Cockrell:

> With the allegation that they were operating the train which did the injury unchallenged, the showing amounted to nothing more than a traverse of the charges of negligence . . . .

Cockrell, 232 U.S. at 153. Based on this single sentence from Cockrell, New England concludes the following:

> Cockrell simply reaffirmed the rule that a removing defendant, in the petition for removal, is required to present something beyond a mere denial of the complaint to allege fraudulent joinder.

(Def. New England's Supp. & Am. Opp., Docket No. 18 in Civil Action No. 03-11040, at 8). I am not persuaded because New England's interpretation based on this single sentence fails to account for or explain the remainder of the Court's reasoning in Cockrell.

New England's resistance to my interpretation of Cockrell is understandable. My interpretation of Cockrell, in effect, keeps the doctrine of fraudulent joinder within narrow limits and thus reduces the ability of defendants to escape from state courts. It is important to

remember, however, that the doctrine of fraudulent joinder is a judicially-created exception to the complete diversity rule. See Triggs, 154 F.3d at 1287 ("Fraudulent joinder is a judicially created doctrine that provides an exception to the requirement of complete diversity."). It is both prudent and appropriate to keep the doctrine within narrow limits rather than to expand it. Expansion of diversity jurisdiction remains the prerogative of Congress.

iii. Cockrell in Other Circuits

The law regarding Cockrell in the few other federal circuits that have considered the Supreme Court opinion is mostly consistent with the interpretation and conclusions I stated above.

As noted previously, a panel of the Fifth Circuit concluded in Smallwood I that Cockrell articulates a "common defense rule." The panel's explanation of Cockrell is similar in significant and relevant part to my interpretation of Cockrell. The Fifth Circuit opinion in Smallwood II, in which the panel from Smallwood I denied a panel rehearing, states the following:

> The Supreme Court [in Cockrell] thus made clear that the burden on the removing party is to prove that the joinder of the local parties was fraudulent; a showing that the plaintiff's case is barred as to all defendants is not sufficient. . . .
>
> The common defense rule [in Cockrell] reminds us that the proper focus of a fraudulent joinder claim is whether the joinder of the local parties was fraudulent, a simple concept that is too easily obscured. . . . [W]hen on a motion to remand a defendant's showing that there is no possibility of recovery against the local defendant equally discharges the non-resident defendant, there is no fraudulent joinder, only a lawsuit lacking in merit. In such cases, it makes little sense to single out the local defendants as "sham"

> defendants and call their joinder fraudulent. In such circumstances, the allegation of fraudulent joinder is more properly an attack on the plaintiff's case as such – an allegation that "the plaintiff's case [is] ill founded as to all the defendants." Cockrell, 232 U.S. at 153.

Smallwood II, 352 F.3d at 222-23.

The Fifth Circuit case law regarding Cockrell does present two issues, however. The first is one of terminology. Unlike the Fifth Circuit, I do not apply the label "common defense rule." This difference in nomenclature is not so significant as to warrant extended explanation, but I do state the following brief reasons. First, the use of the label "common defense rule" implies that Cockrell articulated an exception or an addition to the doctrine of fraudulent joinder. In my view, Cockrell merely clarified the doctrine of fraudulent joinder. Second, the use of "common defense" can be ambiguous. The Henderson plaintiffs, for example, erroneously understand "common defense" to mean similar or identical defenses asserted separately by both the non-diverse and diverse defendants. The Fifth Circuit, however, manifested an intent for the phrase to mean a single defense that applies commonly. In my view, therefore, it is more appropriate to avoid entirely use of the phrase "common defense."

The second issue presented by the Fifth Circuit is that some confusion surrounds the Fifth Circuit case law on Cockrell.

A panel of the Fifth Circuit adopted the "common defense rule" in August 2003 in Smallwood I. Very soon after Smallwood I, a different panel of the Fifth Circuit decided Ross v. Citifinancial, Inc., 344 F.3d 458 (5th Cir. 2003). Like Smallwood I, Ross involved the removal of a case to federal court on the basis of fraudulent joinder. The panel in Ross concluded that the non-diverse defendants had been fraudulently joined and affirmed the district court's denial of

remand.

Ross is the genesis of the confusion in the district courts of the Fifth Circuit regarding Cockrell. The problem began with the fact that many federal district judges in the Fifth Circuit concluded that, given the facts, the "common defense rule" could have been applied in Ross. E.g., McDonald v. Union Nat'l Life Ins. Co., 307 F. Supp. 2d 831, 835 (S.D. Miss. 2004). As a consequence, some judges concluded that Ross limits or is inconsistent with Smallwood I. See, e.g., id. (This line of interpretation, which is not embraced by all federal district judges in the Fifth Circuit, see Griffin v. Am. Gen. Fin. Inc., No. 1:03CV155, 2004 WL 716777 (N.D. Miss. Mar. 17, 2004), notably began with Judge Barbour, the judge whom Smallwood I reversed. See Brumfield v. Pioneer Credit Co., 291 F. Supp. 2d 462, 466-67 (S.D. Miss. 2003) (Barbour, J.).) The opinion in Ross does not, however, mention Smallwood I, Cockrell, or the "common defense rule." I will return to this fact shortly.

Days after Ross, yet another panel of the Fifth Circuit decided Collins v. American Home Products Corp., 343 F.3d 765 (5th Cir. 2003). The opinion in Collins cites with approval the "common defense" analysis presented in Smallwood I. The opinion does not mention Ross or conclude in any way that the principles from Smallwood I have been or should be limited.

After Collins, in December 2003, the panel from Smallwood I issued Smallwood II, denying a panel rehearing. The panel expanded its analysis of Cockrell and, significantly, "emphasize[d] . . . that the common defense rule is not limited to cases that seek to avoid the well-pleaded complaint rule." Smallwood II, 352 F.3d at 224. This emphasis may have been a response to the contention that a limitation was being introduced.

The capstone on the muddle came later in December 2003 in Smallwood III, when

the Fifth Circuit granted a rehearing en banc of Smallwood I. The oral argument for the rehearing occurred May 25, 2004.

The foregoing events led one federal district judge in the Fifth Circuit – Judge Barbour, again – to throw up his hands:

> The conflict in the Smallwood and Collins cases on the one hand, and the Ross case on the other hand, has left the "common defense" issue in this case, as well as a myriad of other cases in which "common defenses" are alleged, in a state of total confusion.

McDonald, 307 F. Supp. 2d at 835.

The question that arises is whether this confusion undercuts my earlier conclusion that the Fifth Circuit's position regarding Cockrell is similar in significant and relevant part to my interpretation of Cockrell. I am not persuaded that it does. In my view, an examination of the opinions written by the Court of Appeals for the Fifth Circuit reveals that the "confusion" is only at the district level, not at the circuit level.

I do not agree with Judge Barbour and other district judges of the Fifth Circuit who assert that Ross limits or conflicts with Smallwood I or the "common defense rule" adopted therein. The Ross opinion does not mention either Cockrell or Smallwood I. It does not mention, much less explicitly refute, qualify, or limit, the "common defense rule."

Judge Barbour suggested the following:

> Based on the omission of any analysis regarding the "common defense" theory by the Ross court, a reasonable inference can be drawn that the holding in Smallwood is limited to federal defenses that are common to all defendants, and not to any other form of common defenses.

E.g., McDonald, 307 F. Supp. 2d at 835 (Barbour, J.); see also Brumfield, 291 F. Supp. 2d at

466-67 (Barbour, J.). I conclude, however, that it is more appropriate to infer from the omission of any analysis regarding the "common defense rule," Cockrell, or Smallwood I that the panel in Ross simply did not consider or was not presented with those issues. Cf. Palma v. Verex Assurance, Inc., 79 F.3d 1453, 1463 (5th Cir. 1996) (citing Matter of Texas Mortgage Servs. Corp., 761 F.2d 1068, 1073 (5th Cir. 1985) (holding that issues not raised in the appellate brief need not be considered by the court of appeals)); Ramos v. Roche Prods., Inc., 936 F.2d 43, 51 (1st Cir. 1991) (same).

Judge Pepper of the Northern District of Mississippi has reached this exact inference. In a recent opinion, he reasoned:

> While [Green Plains Trust Co. v. Morgan Stanley Dean Witter & Co., 313 F.3d 305 (5th Cir. 2002), and Green v. R.J. Reynolds Tobacco Co., 274 F.3d 263, 269 (5th Cir. 2001),] do in fact address particular common defenses in considering whether there was fraudulent joinder, it does not appear from the context of the cases that any of the parties questioned the propriety of doing so . . . . Upon review, the Court finds that these cases do not directly address the broader question posed by Smallwood . . . , e.g., whether such a common defense affords an appropriate foundation for removal jurisdiction predicated on fraudulent joinder.

Griffin, 2004 WL 716777, at *5. Judge Pepper then concluded that

> [t]he same is true of the decision in Ross . . . . Nowhere in the opinion is it evident that the parties litigated the common claims/defenses issue in the district court, or that the issue was one raised by the plaintiff in the appeal.

Id. at *5 n.7; see also Jenkins v. Union Nat'l Life Ins. Co., No. 4:03CV0034, 2004 WL 555250, at *3 (N.D. Miss. Mar. 15, 2004) (Pepper, J.) (stating that the conflict between Ross and Smallwood I is only "apparent," by which the court "means to say that the two decisions do not directly conflict since neither addresses the other").

Accordingly, I infer that the absence from the Ross opinion of any analysis regarding Smallwood I, Cockrell, or the "common defense rule" simply means that the panel in Ross did not consider those matters. This inference leads to the conclusion that the opinion in Ross should not be understood either as conflicting with or in any way limiting the position taken in Smallwood I regarding Cockrell.

For these reasons, I am not persuaded that the "confusion" in the Fifth Circuit undercuts my earlier conclusion that the Fifth Circuit's position regarding Cockrell is similar in significant and relevant part to my interpretation of Cockrell. It is possible, of course, that the soon-to-be-issued en banc opinion regarding Smallwood I may alter the Fifth Circuit position on Cockrell. In my view, however, that result is unlikely and, in any event, only speculative.

In the Third Circuit, the case law regarding Cockrell also is similar in significant and relevant part to my interpretation of Cockrell. In Boyer v. Snap-On Tools Corp., 913 F.2d 108 (3d Cir. 1990), the Court of Appeals for the Third Circuit concluded the following:

> Informed by Cockrell, we hold that where there are colorable claims or defenses asserted against or by diverse and non-diverse defendants alike, the court may not find that the non-diverse parties were fraudulently joined based on its view of the merits of those claims or defenses. Instead, that is a merits determination which must be made by the state court.

Id. at 113.

In another passage, the opinion in Boyer characterizes Cockrell as forbidding a "district court, in the guise of deciding whether the joinder was fraudulent, [from] stepp[ing] from the threshold jurisdictional issue into a decision on the merits." Boyer, 913 F.2d at 112. In my view, however, this statement is unlikely to be adopted by the First Circuit. A decision about

fraudulent joinder is a decision about merits; it is a decision about the merits of the case against the non-diverse defendants. The diverse defendant or defendants must show, after all, that no case can be made against the non-diverse defendants.

Perhaps this aspect of the Boyer opinion rested on an interpretation of the following sentence from Cockrell:

> As no negligent act or omission personal to the railway company was charged, and its liability, like that of the two employees, was, in effect, predicated upon the alleged negligence of the latter, the showing manifestly went to the merits of the action as an entirety, and not to the joinder; that is to say, it indicated that the plaintiff's case was ill founded as to all the defendants.

232 U.S. at 153 (emphasis added). The emphasized portion of the sentence could be read, at first blush, to distinguish between a "decision on the merits" and a "threshold jurisdictional issue." Such a reading, however, fails to take into account the phrase "as an entirety" or the Court's subsequent emphasis on "all the defendants." Thus, as explained earlier, the relevant distinction is between a claim that goes to all the defendants – to the merits of the action as an entirety – and a claim of fraudulent joinder.

I turn now to Ritchey v. Upjohn Drug Co., 139 F.3d 1313 (9th Cir. 1998), in which a panel of the Court of Appeals for the Ninth Circuit appears to reject the proposition that fraudulent joinder does not exist when an argument offered to prove the fraudulent joinder of non-diverse defendants simultaneously shows that no case exists against the diverse defendant or defendants. The Ritchey opinion, however, does not explore (much less reject) the possibility that the Supreme Court, in Cockrell, adopted the proposition. I conclude, therefore, that I need not consider the opinion in Ritchey any further.

iv. Summary of the Legal Standard for Fraudulent Joinder

In deciding the motions to remand filed by the Kendall, Henderson, and Caston plaintiffs, I will follow the well-reasoned opinions of Judges Saris and Harrington of this court in Mills and Fabiano Shoe respectively together with the opinion of the Court of Appeals for the Second Circuit in Whitaker. Under those opinions, a defendant who alleges fraudulent joinder of non-diverse defendants bears the burden of demonstrating, by clear and convincing evidence, either (1) that an outright fraud has been committed in the plaintiff's pleadings, or (2) that the pleadings show that no reasonable expectation exists of the plaintiff stating a cause of action in state court against the non-diverse defendants.

I will also follow the Supreme Court opinion in Cockrell. Under Cockrell, fraudulent joinder does not exist when an argument offered to prove the fraudulent joinder of non-diverse defendants simultaneously shows that no case can be made against the diverse defendant or defendants.

4. Disposition

Plaintiffs in all three cases have alleged numerous acts of tort by their respective non-diverse defendants.

Defendant New England does not allege that an outright fraud has been committed in the plaintiffs' pleadings in any of the three cases. Rather, New England asserts fraudulent joinder in all three cases under the second prong of the applicable test, contending that the Kendall, Henderson, and Caston plaintiffs have no reasonable possibility of stating a cause of action in state court against their respective non-diverse defendants for the alleged torts.

New England attempts to do so in several ways. It contends in all three cases, for example, that plaintiffs do not satisfy necessary elements for certain alleged torts. It also asserts in all three cases that the respective statutes of limitation have run.

Some question exists as to whether statutes of limitation can be invoked in the fraudulent joinder context. See In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liability Litig., MDL No. 1203, slip op. at 7 (E.D. Pa. 2003) ("While our Court of Appeals has not spoken on whether a statute of limitations defense may be considered in support of a fraudulent joinder claim, we agree with two Courts of Appeals and my colleagues . . . that have answered the question in the affirmative."); see also Ritchey v. Upjohn Drug Co., 139 F.3d 1313 (9th Cir. 1998) (concluding that California statute of limitation defenses may be invoked in support of a fraudulent joinder claim). I am aware of no court in this circuit that has considered the question, but courts in other circuits have concluded that statutes of limitation may be considered in the fraudulent joinder context. See, e.g., LeBlang Motors, Ltd. v. Subaru of America, Inc., 148 F.3d 680, 690-91 (7th Cir. 1998).

But in light of Cockrell, I need not and do not reach this question in any of the three cases.

To prove fraudulent joinder of the non-diverse defendants, New England argues in all three cases that plaintiffs have no reasonable possibility of stating a cause of action against the non-diverse defendants for their alleged torts.

In Caston, however, such an argument simultaneously shows that no case can be made against the diverse defendant. Specifically, the claims in Caston against New England (the diverse defendant) are based in respondeat superior; New England's liability in Caston is

predicated entirely upon the torts allegedly committed by the non-diverse Caston defendants. As a consequence, if no cause of action can be stated against the non-diverse defendants for their alleged torts, no case exists against New England. (For example, if a statute of limitation has run on a claim against a non-diverse defendant, it necessarily has run for New England.) Accordingly, the arguments offered by New England to prove fraudulent joinder simultaneously show that no case can be made against the diverse defendant.

It follows, under Cockrell, that the non-diverse defendants in Caston are not fraudulently joined. As a result, complete diversity does not exist in Caston. Because I ascertain no other basis for federal subject matter jurisdiction, remand is required under 28 U.S.C. § 1447. The Practice and Procedure Order below allows the Caston plaintiffs' motion to remand (Docket No. 35 in Civil Action No. 03-11547) and directs the Clerk to return Caston (No. 03-11547-REK) to the state court from which it was removed.

In Kendall and Henderson, some claims against New England are based in the doctrine of respondeat superior. Accordingly, the arguments offered by New England to prove fraudulent joinder concomitantly show in these cases that some claims against the diverse defendant must fail.

These circumstances are similar to, but not exactly the same as, the circumstances under which Cockrell precludes a finding of fraudulent joinder. The arguments offered to prove fraudulent joinder do not show that no case can be made against the diverse defendant.

But, for the following reasons, I conclude that the difference is irrelevant. The Court in Cockrell concluded that fraudulent joinder does not exist when an argument offered to prove fraudulent joinder of non-diverse defendants simultaneously shows that no case can be

made against the diverse defendants. The explanation for this conclusion was that such an argument "does not engender or compel the conclusion that the [non-diverse defendants] were wrongfully brought into a controversy which did not concern them." Cockrell, 232 U.S. at 153. Stated differently, if an argument offered to prove fraudulent joinder of non-diverse defendants also shows that no case exists against the diverse defendants, no legitimate reasons exist to set apart the non-diverse defendants as "fraudulently joined."

The concerns that underlie Cockrell also apply to arguments offered to prove fraudulent joinder that simultaneously show that some claims against the diverse defendant or defendants must fail. Such arguments do not engender or compel the conclusion that the non-diverse defendants were wrongfully brought into a controversy that did not concern them. They do not offer a legitimate reason to set apart the non-diverse defendants as "fraudulently joined."

Accordingly, I conclude that, in light of Cockrell, the non-diverse defendants in Kendall and Henderson are not fraudulently joined. This court thus does not have federal subject matter jurisdiction in these cases on the basis of diversity. Because I ascertain no other basis for federal subject matter jurisdiction, remand of Kendall and Henderson is required under 28 U.S.C. § 1447.

The Practice and Procedure Order below allows the Kendall plaintiffs' motion to remand (Docket No. 5 in Civil Action No. 03-11040) and the Henderson plaintiffs' motion to remand (Docket No. 4 in Civil Action No. 03-11041). Furthermore, it directs the Clerk to return Kendall (No. 03-11040-REK) and Henderson (No. 03-11041-REK) to the state courts from which they were removed.

D. Remaining Motions

1. Kendall

In light of the decision to remand Kendall (No. 03-11040-REK) to the state court from which it was removed, defendant Ratcliffe and McNamara's motion to dismiss is moot. Defendant Jordan's motion for summary judgment is similarly moot. The Practice and Procedure Order below accordingly denies as moot both defendant Ratcliffe and McNamara's motion to dismiss (Docket No. 12) and defendant Jordan's motion for summary judgment (Docket No. 17).

2. Henderson

In light of the decision to remand Henderson (No. 03-11041-REK) to the state court from which it was removed, defendant DeLoach and Spring's motion to dismiss is moot. Defendant Jordan's motion for summary judgment is similarly moot. The Practice and Procedure Order below accordingly denies as moot both defendant DeLoach and Spring's motion to dismiss (Docket No. 12) and defendant Jordan's motion for summary judgment (Docket No. 16).

IV. Pike County National Bank (Civil Action No. 03-11548-REK)

A. Pending Matters

Pending for decision before this court are matters related to the following filings:

(1) Plaintiff's Motion To Remand (Docket No. 23, filed November 14, 2003), with Memorandum in Support of Motion To Remand (copy of the memorandum filed in S.D. Miss. (CA No. 3:03-51) before transfer to this court), and Letter from Grady Tollison Supplementing Plaintiff's Motion To Remand (Docket No. 28, filed January 6, 2004);

(2) New England's Opposition to Plaintiff's Motion To Remand (Docket No. 24, filed November 28, 2003), with New England's Memorandum of Authorities Supporting Opposition to Plaintiff's Motion To Remand (Docket No. 25, filed December 1, 2003);

(3) Defendant Hilliard's Opposition to Plaintiff's Motion To Remand (Docket No. 26, filed November 28, 2004);

(4) Plaintiff's Supplemental Motion To Remand and Motion for Expedited Hearing (Docket No. 29, filed May 10, 2004).

B. Relevant Procedural Background

On July 20, 2000, plaintiff Pike County National Bank filed this civil action in the Circuit Court of Hinds County, Mississippi.

On September 7, 2000, defendant Metropolitan Life Insurance Company (successor in interest of New England Mutual Life Insurance Company, hereinafter referred to as "New England") removed the action to the United States District Court for the Southern District of Mississippi.

Plaintiff moved to remand the case to the Circuit Court of Hinds County. On September 19, 2001, U.S. District Judge Henry Wingate remanded the action to the state court.

On January 17, 2003, defendant New England removed the action a second time to the United States District Court for the Southern District of Mississippi. Plaintiff again moved to remand the case to state court.

On August 12, 2003, before plaintiff's motion to remand was decided, the Judicial Panel on Multidistrict Litigation transferred the action to this court.

On November 11, 2003, plaintiff filed in this court a motion to remand the action to the Circuit Court in Hinds County, Mississippi (Docket No. 23). Defendant New England and defendant Hilliard have both filed oppositions (Docket Nos. 25 and 26).

At a hearing on December 12, 2003, this court heard oral argument on all motions pending at the time.

On May 10, 2004, plaintiff filed in this court a supplemental motion to remand and motion for expedited hearing (Docket No. 29).

C. Plaintiff's Motion To Remand

1. Introduction

It is my ordinary practice in these multidistrict litigation proceedings to have parties who are transferred to this court re-file with the Clerk of this court any motions that were pending at the time of transfer. Accordingly, even though plaintiff forwarded to this court a copy of the motion to remand and accompanying memorandum that were pending in the United States District Court for the Southern District of Mississippi, I requested through my Deputy Clerk that the papers be re-filed in this court.

Plaintiff re-filed with this court the motion to remand (Docket No. 23), but neglected to file a copy of the memorandum in support. Plaintiff's counsel refused, even after conversation with the Deputy Clerk, to file with this court a copy of the memorandum in support.

To avoid prejudicing plaintiff as a result of its counsel's inexplicable failure to comply with the requests and procedures of this court, I take into consideration the forwarded copy of the memorandum in support that was filed in the Southern District of Mississippi. I have

so noted in the list of pending matters.

2. Disposition

In the ordinary course, a case may be removed by defendants under 28 U.S.C. § 1441 from state court to federal court only at the outset of the civil action. Specifically, the statutory provision that governs removal procedure (28 U.S.C. § 1446) states the following:

> The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

28 U.S.C. § 1446(b) (emphasis added). Following these requirements, defendant New England removed this case to federal district court in September 2000. The U.S. District Court remanded the case to state court.

Now, at a time well beyond the thirty-day limitation specified above, defendant New England has removed this case again. New England contends that this removal is permitted, directing this court to the second paragraph of 28 U.S.C. § 1446(b):

> If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable . . . .

Id.

The above paragraph has been construed to allow defendants in a civil action to

remove cases that, like the case at bar, have previously been removed and remanded. For example, an opinion by the First Circuit characterizes the paragraph "and the doctrine codified therein" as follows:

> [A] defendant who fails in an attempt to remove on the initial pleadings can file a removal petition when subsequent pleadings or events reveal a New and Different ground for removal.

Fed. Deposit Ins. Corp. v. Santiago Plaza, 598 F.2d 634, 636 (1st Cir. 1979); see also S.W.S. Erectors v. Infax, Inc., 72 F.3d 489, 492-94 (5th Cir. 1996).

New England contends that it has moved appropriately for a second removal under this paragraph. It asserts that, in accordance with the paragraph, it filed a notice of removal within thirty days of receiving "an amended pleading, motion, order or other paper from which it [was] first . . . ascertained that the case is one which is or has become removable." 28 U.S.C. § 1446(b).

Specifically, New England directs this court to two letters produced to it on December 20, 2002 by Gerald Taylor, plaintiff's accountant. New England filed a notice of removal within thirty days of receiving these letters, which it contends constitute "other paper."

According to New England, it "first ascertained" from these letters that "the case is one which is or has become removable." It contends that it ascertained that the claims in this case are completely preempted by federal law – the Employee Retirement Income Security Act ("ERISA"), in particular.

For the reasons below, however, I conclude that New England learned from these letters nothing new about the removability of this case.

Some background information is necessary. In its previous removal of this case, New England contended that the claims in this case are completely preempted by ERISA.

Specifically, it asserted that this case involves a retirement plan under ERISA, and that plaintiff sought to recover benefits and clarify its rights under the plan. The United States Supreme Court has concluded that ERISA completely preempts state law claims that fall within the civil enforcement provision of ERISA, which includes the recovery of benefits and the clarification of rights under ERISA plans. See Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 66 (1987).

According to New England, plaintiff responded by asserting that the retirement plan at issue is a "top hat" plan and, therefore, exempt from complete preemption by ERISA.

I turn now from background matters back to the case at bar. New England contends that, until it received the letters, it had no basis to challenge plaintiff's characterization of the retirement plan as a "top hat" plan. The letters allegedly present new facts that show the retirement plan is not a "top hat" plan, which, New England asserts, means that the plan is not exempt from complete preemption by ERISA. New England argues that it accordingly has ascertained from the letters that the case is one which is or has become removable.

If all of the foregoing were true statements of fact and accurate contentions of law, New England could argue convincingly that it has satisfied the conditions for a second removal under Section 1446(b). The problem, however, is that at least one contention of law is incorrect. Both defendant New England and plaintiff assert that a "top hat" plan is exempt from complete preemption by ERISA. This assertion is mistaken.

As both parties suggest in their briefs, a "top hat" plan is "'unfunded' and 'maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees.'" Cogan v. Phoenix Life Ins. Co., 310 F.3d 238, 242 (1st Cir. 2002) (quoting 29 U.S.C. § 1101(a)(1)); see also Garratt v. Knowles,

245 F.3d 941, 946 n.4 (7th Cir. 2001); Demery v. Extebank Deferred Compensation Plan (B), 216 F.3d 283, 286-87 (2d Cir. 2000). Such plans are exempt from ERISA's vesting, participation, funding, and fiduciary rules. See Garratt, 245 F.3d at 946 n.4; Demery, 216 F.3d at 287; Hampers v. W.R. Grace, 202 F.3d 44, 46 n.3 (1st Cir. 2000).

"Top hat" plans are not, however, exempt from all of ERISA's provisions. They are subject, for example, to ERISA's criminal and civil enforcement provisions. See Garratt, 245 F.3d at 946 n.4; Demery, 216 F.3d at 287; Hampers, 202 F.3d at 46 n.3. As explained previously, ERISA completely preempts state law claims that fall within the civil enforcement provision of ERISA. See Taylor, 481 U.S. at 66. Accordingly, "top hat" plans are not exempt from complete preemption by ERISA. See Garratt, 245 F.3d at 945-48 (concluding that ERISA completely preempted claims regarding a "top hat" plan). (In contrast, an "excess benefit" plan is entirely exempt from ERISA. See Goldstein v. Johnson & Johnson, 251 F.3d 433, 437 n.2 (3d Cir. 2001); Garratt, 245 F.3d at 946 n.4.)

Because a "top hat" plan is not exempt from complete preemption by ERISA, defendant New England could not ascertain from the letters anything at all about the removability of this case. Even assuming that the letters revealed a change in the "top hat" status of the plan at issue, as New England claims they do, this case is as removable now as it was before New England received the letters. The law is clear and unambiguous: contrary to the assertion of plaintiff and New England, a "top hat" plan is subject to complete preemption by ERISA to the same extent as a plan that is not a "top hat" plan.

As stated above, I conclude for the foregoing reasons that New England learned from the "Gerald Taylor" letters nothing new about the removability of this case.

New England therefore has not received "an amended pleading, motion, order or other paper from which it [was] first . . . ascertained that the case is one which is or has become removable." 28 U.S.C. § 1446(b) (emphasis added). Accordingly, New England is not permitted under the second paragraph of Section 1446(b) to bring this second removal. Remand is thus required. The Practice and Procedure Order below allows plaintiff's motion to remand (Docket No. 23), and directs the Clerk to return this civil action (No. 03-11548-REK) to the state court from which it was removed.

I note that plaintiff did not suggest the basis upon which I have remanded this case. It was, after all, plaintiff who first erroneously asserted that a "top hat" plan is exempt from complete preemption by ERISA. Plaintiff challenges the removal by New England on several other grounds. I need not and do not decide those questions.

The irony of this situation is not lost on this court. This case has resulted in a resolution favorable to plaintiff on the basis of a misstatement of law initially advanced by plaintiff. Defendant New England, however, either erred in its research or relied erroneously on plaintiff's mistaken assertion.

D. Plaintiff's Supplemental Motion To Remand

Plaintiff has filed what it has entitled a "Supplemental Motion To Remand and Motion for Expedited Hearing." In reality, the motion neither provides substantive supplemental information regarding remand nor seeks an expedited hearing. Rather, plaintiff's motion appears simply to be a request for a ruling on its motion to remand. In light of the rulings and conclusions above, I conclude that plaintiff's motion is moot.

The Practice and Procedure Order below accordingly denies this motion (Docket No. 29) as moot.

PRACTICE AND PROCEDURE ORDER NO. 19

For the foregoing reasons, it is ORDERED:

(1) No tag-along civil actions remain before this court in this MDL proceeding, MDL-1105 (REK).

(2) No Case Management Conference ("CMC") is scheduled for these MDL proceedings.

In Kendall et al. v. Metropolitan Life Insurance Co. et al., Civil Action No. 03-11040-REK:

(1) Plaintiffs' Motion To Substitute the Affidavit of Allen K. Hess (Docket No. 24) is ALLOWED.

(2) Plaintiffs' Motion To Remand (Docket No. 5) is ALLOWED.

(3) The Clerk is directed to return this civil action (No. 03-11040-REK) to the state court from which it was removed.

(4) Defendants Ratcliffe and McNamara's Motion To Dismiss, or, in the Alternative, for Summary Judgment (Docket No. 12) is DENIED AS MOOT.

(5) Defendant Jordan's Motion for Summary Judgment (Docket No. 17) is DENIED AS MOOT.

In Henderson et al. v. Metropolitan Life Insurance Co. et al., Civil Action No. 03-11041-REK:

(1) Plaintiffs' Motion To Substitute the Affidavit of Allen K. Hess (Docket No. 22) is ALLOWED.

(2) Plaintiffs' Motion To Remand (Docket No. 4) is ALLOWED.

(3) The Clerk is directed to return this civil action (No. 03-11041-REK) to the state court from which it was removed.

(4) Defendants Cooper DeLoach and Kyle Spring's Motion To Dismiss, or, in the Alternative, for Summary Judgment (Docket No. 12) is DENIED AS MOOT.

(5) Defendant Fulton A. Jordan's Motion for Summary Judgment (Docket No. 16) is DENIED AS MOOT.

In Caston et al. v. Metropolitan Life Ins. Co. et al., Civil Action No. 03-11547-REK:

(1) Plaintiffs' Motion To Remand (Docket No. 35) is ALLOWED.

(2) The Clerk is directed to return this civil action (No. 03-11547-REK) to the state court from which it was removed.

In Pike County National Bank v. Metropolitan Life Insurance Co. et al., Civil Action No. 03-11548-REK:

(1) Plaintiff Pike County National Bank's Motion To Remand (Docket No. 23) is ALLOWED.

(2) The Clerk is directed to return this civil action (No. 03-11548-REK) to the state court from which it was removed.

(3) Plaintiff Pike County National Bank's Supplemental Motion To Remand and Motion for Expedited Hearing (Docket No. 29) is DENIED AS MOOT.

____/s/ Robert E. Keeton_____

Robert E. Keeton
Senior United States District Judge

Publisher Information

Note* This page is not part of the opinion as entered by the court. The docket information provided on this page is for the benefit of publishers of these opinions.

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